

COMMENTS
OF THE
SAN FRANCISCO PUBLIC UTILITIES COMMISSION
AND THE
EAST BAY MUNICIPAL UTILITIES DISTRICT
BEFORE THE STATE WATER RESOURCES CONTROL BOARD
AT
BAY-DELTA WORKSHOP NUMBER 4.

The San Francisco Public Utilities Commission and the East Bay Municipal Utilities District jointly submit these comments to Issue Number 3 of the Notice for this workshop.

Question #3: Should the SWRCB request the CVP and SWP to implement portions of the draft standards prior to adoption of a water rights decision?

The SWRCB has solicited comment on whether it should request the State Water Project (SWP) and the federal Central Valley Project (CVP) to implement portions of draft Bay-Delta standards pending completion of the water rights phase of this proceeding. Subsumed within this question is the possibility of partial implementation of standards during the interim period before a water rights phase can be completed. It further raises the question of whether the SWRCB might adopt something less than a standard which provides the full level of protection determined by the SWRCB to be needed to address the water quality requirements of the Bay-Delta (hereinafter "full standards") prior to completion of the water rights phase. Accordingly, these comments will address all aspects of the issue.

San Francisco and East Bay Municipal Utilities District support the CUWA recommendation that full standards be adopted as soon as possible. See CUWA Comments to EPA's Proposed Standards, March 9, 1994, and attachments thereto. Protections for the aquatic resources of the Bay-Delta must be established expeditiously to halt any further decline. It is in the best interests of all parties to restore the ecology of the Bay-Delta sooner rather than later in order to allow recovery of listed species, to prevent any further listings, and to restore the equilibrium and predictability of water operations that rely on the Delta for their supplies. Further, adoption of a partial standard would not be conducive to the state-federal cooperative effort to resolve Bay-Delta issues, as it is doubtful that the EPA would be satisfied with anything less than a fully protective standard in the short term.

Furthermore, while implementation of the full standards may present complex issues of legal rights, scientific justification and public policy, this should not deter the SWRCB from establishing such standards at this time. *United States v. State Water Resources Control Board*, (1986) 182 Cal.App.3d 82 (*US v. SWRCB*) at 122 ("[W]e do not believe that difficulty in enforcement justifies a bypass of the legislative imperative to establish water quality objectives, which, in the judgment of the SWRCB, will ensure reasonable protection of beneficial uses.")

Once the SWRCB adopts a Water Quality Control Plan for the Bay-Delta in this stage of the proceeding, whether it contains full or partial standards, the SWRCB will begin the process of implementing the Plan through a water rights phase that will allocate responsibility for meeting the standards to individual water rights holders. That allocation of responsibility must take place within the context of settled principles of California water rights law. See generally, *Legal Brief of the Public Utilities Commission of the City and County of San Francisco in the Interim Water Rights Hearing for the Water Rights Phase of the Bay-Delta Hearings* ("San Francisco Interim Phase Legal Brief"). In allocating responsibility for meeting standards in a water rights phase the SWRCB acts in an adjudicatory capacity, *US v. SWRCB*, 182 Cal.App.3d at 112, and must conform to the procedural and substantive requirements that are inherent in that quasi-judicial function.

CUWA has recommended that the SWRCB phase in the implementation of full standards. Phasing of standards would address three issues: 1) it would allow the SWRCB to address the other causes of decline of the Delta's ecosystem over which it has control; 2) it would avoid unduly burdening the SWP and the CVP with sole responsibility for meeting Delta standards until such time as other legally responsible parties are included in the Delta solution; and 3) it would afford the SWRCB time to determine which entities are legally responsible for participating in the Delta solution.

The SWRCB has the authority to decide whether to implement standards fully in the interim period, or whether it will only require partial implementation of standards during the water rights phase. If the SWRCB should determine that standards should be fully implemented at this time, it has the legal means available to immediately and fully implement the new standards pending completion of a comprehensive water rights phase. The SWRCB could require the SWP and CVP to fully or partially meet the new Bay-Delta standards. In addition, many junior water rights are subject to the Board's reserved jurisdiction to modify permit conditions to require contributions toward meeting Bay-Delta standards. Modification of these "Term 80," "Term 91" and "Term 93" permits pursuant to the SWRCB's reserved jurisdiction would require notice and a hearing; however, a single hearing would be sufficient to reach a large number of water users in the Bay-Delta system, and would provide an efficient mechanism for implementing standards in the short term for a broad base of water users. A brief discussion of the SWRCB's legal authority to require compliance by the two projects and junior water rights holders is attached hereto as Appendix A.

The recent Framework Agreement between the state and federal governments anticipates an "equitable contribution" by the two projects toward meeting new SWRCB standards in the interim period pending completion of a water rights phase. Framework Agreement, Exhibit A, paragraph 5. The Framework Agreement anticipates that current operational criteria imposed by the ESA could result in at least partial if not full compliance with SWRCB standards. This is consistent with CUWA's position that standards should be implemented as fully as possible at the earliest opportunity.

If the SWRCB decides not to require full implementation of the standards by the SWP and CVP, it must undertake the task of defining what would constitute an "equitable contribution" by the two projects towards meeting standards. In doing so, the SWRCB must remember that any such interim arrangement with the projects will be temporary. The danger of setting an equitable contribution to be met by the projects during the interim period is the tendency to regard such contribution as a cap on the allocation of responsibility to the two projects. The SWRCB must bear in mind that such negotiated contributions cannot preempt the water rights hearing process. In allocating responsibility to non-project water users, the water rights phase will necessarily involve an individualized balance of reasonable use and public trust factors as to each potentially responsible party's water diversion and use. Thus, the degree of non-project water users' overall contribution cannot be guessed at before that process has been concluded, and any project responsibility will have to be redefined once non-project contributions are quantified at the conclusion of the water rights phase. See San Francisco Interim Phase Legal Brief.

APPENDIX A

Sources of State Water Resources Control Board Legal Authority for Short Term Implementation of Bay-Delta Standards.

The SWRCB's power to require compliance with new standards exists in the reserved jurisdiction it retains over a sizeable portion of water rights in the Bay-Delta through a series of permit conditions, water rights decisions, legislative mandates and the Coordinated Operation Agreement between the two projects.

Existing terms and conditions in water rights permits grant the SWRCB immediate power to implement standards in the Bay-Delta in relation to a broad base of water users. Specifically, "Term 80," "Term 91" and "Term 93" conditions are contained in all post-1965 water rights permits subject to Water Rights Decision 1594 and Water Right Order 84-2. Term 80 puts permit holders on notice that the SWRCB has reserved jurisdiction over the permit to change the season of diversion to conform to the availability of water available for appropriation after prior water rights and water quality standards have been satisfied. D-1594 at 4. Term 91 prohibits diversion by the permittee whenever the projects are required to release water to meet inbasin needs, defined to include "flows required by the SWRCB for maintenance of water quality and fish and wildlife." D-1594 at 57. Term 93 prohibits permittees in the San Joaquin River basin from diverting water "when conserved water released from New Melones Reservoir is being used to maintain the water quality level in the San Joaquin River at Vernalis at a level of 500 parts per million (ppm) Total Dissolved Solids (TDS) or during any time of low flows when TDS levels at Vernalis exceed 500 ppm." D-1594 at 59. Invocation of the SWRCB's reserved jurisdiction under these permits would require notice and a hearing to affected permit holders. However, these conditions are contained in a large number of permits, and implementation of standards as to all such permits could be done in a single water rights hearing.

The SWRCB specifically tied these permit conditions to meeting water quality standards in the Delta, including outflow standards, in D-1594, where it unequivocally stated that "it is proper for Term 80 permittees throughout the watershed to stop diverting water when all remaining natural flow is needed for maintaining water quality in the Delta and Suisun Marsh." D-1594 at 29; *see also* D-1594 at 9, 35-36. The SWRCB stated several times in that decision that the SWRCB's authority under the permit terms is sufficiently broad to restrict diversions in order to maintain water quality standards in the Delta. *Id.* at 34-35, Order WR 84-2 at 16-17, 23.

The SWRCB's reserved jurisdiction over these permits to require compliance with water quality standards is consistent with the fundamental requirement for receiving a permit to divert water from the state: the availability of surplus water for appropriation. As the SWRCB itself stated: "The availability of water for appropriative right permittees is affected by the quantity which is needed to satisfy holders of prior rights and the quantity necessary for protection of other beneficial uses." Order WR 84-2 at 2. Holders of water rights permits are on notice from the outset that their rights are subject to their priority and the terms and conditions contained in their permits. The SWRCB itself has asserted that the permit conditions are sufficient to put the permit holders on notice that an exercise of reserved jurisdiction for the purpose of meeting

water quality standards could occur, and the SWRCB has declined to limit the jurisdiction which the SWRCB may exercise over permittees in the future in order to carry out its functions. Order WR 84-2 at 24. Accordingly, there is no inequity in exercising the SWRCB's authority pursuant to those permit conditions to ensure the protection of water quality in the Bay-Delta pending the outcome of the water rights phase of these proceedings.

In addition to the general authorities described above, there are several sources of authority regarding the existing responsibility of the state and federal projects to meet water quality standards for the Bay-Delta. Water Code § 12202 provides that "[a]mong the functions to be provided by the [State Water Project], in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control . . . in the Sacramento-San Joaquin Delta." The SWRCB's Decision 1275 approving the permits for operation of the State Water Project (SWP) required compliance with established water quality criteria as a condition of the permits. In D-1485 the SWRCB exercised its reserved jurisdiction to modify the permits of both the CVP and SWP to require the projects to comply with, and to reoperate their various facilities to implement, the ambient water quality standards established for the Delta and Suisun Marsh. Until the SWRCB completes the current round of Bay-Delta hearings, this decision will continue to govern the operation of the CVP and SWP.

In D-1422, the SWRCB ordered the Bureau of Reclamation to release water from New Melones Reservoir whenever such releases are required to maintain water quality in the San Joaquin River at Vernalis at a 500 ppm level of salinity. D-1422 at 31. That permit included Condition 6, providing that "[i]n the event that the Water Quality Control Plan (Interim) is amended or superseded, the foregoing water quality objectives shall be modified to conform to then current criteria," and the SWRCB reserved jurisdiction "for the purpose of revising water release requirements for water quality objectives and fish releases" D-1422 at 31-32. That authority was reaffirmed in Water Rights Order 83-3, which allowed the New Melones project to be operated at full capacity, subject to the condition that "[a]ny deliveries of water which the Bureau may make for consumptive uses are subject to changes in the Bureau's water rights permits which may, in the future, be made pursuant to Condition 6 [of Decision 1422]. Such changes could include increases in the flows required for maintenance of water quality and for fish releases." Water Rights Order 83-3 at 22.

The Agreement between the United States of America and the State of California for the Coordinated Operation of the Central Valley Project and the State Water Project (COA) directly addresses the projects' responsibility for meeting Delta standards. It provides in Article 11(a):

The Central Valley Project and the State Water Project will be operated in conformity with the Delta standards in Exhibit A [containing the D-1485 standards]. Should the State Water Resources Control SWRCB establish new Delta standards, and the United States determines that the operation of the Central Valley Project in conformity with the new standards is not inconsistent with Congressional directives the parties shall amend Exhibit A to conform with the new Delta standards and amend this agreement to the extent necessary to provide for continued operation of both projects to accomplish the purposes of this agreement.

The state and federal government further agree in the COA to "share equally the cost of . . . monitoring activities necessary to ensure compliance with D-1485. COA, Article 12(a). Those monitoring activities are listed in Exhibit C of the COA. The parties, anticipating that monitoring requirements would need to be changed if new standards are adopted, provided that "Exhibit C will be amended, if necessary, to ensure compliance with any Delta standards different from [D-1485]." COA, Article 12(b).

Even the Clean Water Act requires federal facilities to comply with state water quality controls:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity.

Clean Water Act § 313(a), 33 U.S.C. § 1323(a).

The CVPIA itself commits the Secretary of the Interior to "operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act . . . , and all decisions of the State Water Resources Control SWRCB establishing conditions on applicable licenses and permits for the project." CVPIA, Pub.L. 102-575, § 3406(b). The Secretary is further authorized and directed to "assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title." *Id.* at § 3406(b)(2). Additionally, as a result of legislation implementing the COA, the Secretary of Interior is "authorized and directed to operate the [federal] project, in conjunction with the State of California water project, in conformity with [State water quality standards for the Bay-Delta]."

Moreover, the 1962 statute that authorized the construction of the New Melones Reservoir directed the Secretary of the Interior to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife in the New Melones Project." Flood Control Act of 1962, Pub. L. No. 87-874, 76 Stat. 1191. That act further provides that the Secretary shall "determine the quantity of water required to satisfy all existing and anticipated future needs within the basins" and that "the diversions shall at all times be subordinate to the quantities so determined."

The state and federal governments, recognizing that implementation of new standards in a water rights phase of the Bay-Delta proceedings, made some provision for the interim period in the recent Framework Agreement. Exhibit A, paragraph 5 of the Agreement states:

The SWRCB will seek agreement with the California Department of Water Resources and the U.S. Department of the Interior to operate the SWP and CVP to make an equitable contribution to meeting the standards, starting in calendar

year 1995, while the SWRCB is working on a water rights decision to equitably allocate responsibility among water rights holders in the Bay-Delta watershed.

A footnote to that paragraph anticipates that implementation of the standards may be phased, "with the initial phase implemented by the projects during the water rights hearings. Compliance with Endangered Species Act requirements affecting the Bay-Delta may result in actions which contribute to or result in meeting the standards' initial phase."

Thus, the projects anticipate the possibility of meeting full standards during the interim period through compliance with existing project operational constraints before a water rights decision may be concluded. Until calendar year 1995, when the projects have committed to reaching an agreement for making equitable contributions to meeting the SWRCB's new standards, the existing legal status of the projects' water rights permits the SWRCB to require the projects to meet the draft standards in the interim. As the Framework Agreement recognizes, the existing Endangered Species Act biological opinions applicable to the projects should in themselves go a long way toward meeting the SWRCB's new standards.